No. 2742

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK B. McCORMICK, as Receiver of the First National Bank of Salmon, Idaho, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, B. F. OLDEN, FRED G. HAVEMANN and JOHN LOTTRIDGE, Appellees.

BRIEF OF APPELLEE GUY E. BOWERMAN

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

RICHARDS & HAGA,
McKEEN F. MORROW,
Attorneys for Appellee Guy E. Bowerman.

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STATEMENT.

This action was brought by appellant as Receiver of the First National Bank of Salmon, Idaho, against appellee Bowerman (and others) as directors of such bank under the provisions of Sec. 5239 Rev. Stats. of the United States, to recover damages alleged to have been sustained because, as we contend, of the four following alleged violations of such statute:

(a) Excess loans, as alleged in paragraph V, page 11.

(b) Because of the negligence is purchasing the bank of Langsdorf & Company, as alleged in paragraph IX, page 17, of the transcript.

(c) By accepting an alleged illegal dividend, as alleged in paragraph XII, page 24 of the transcript.

(d) Permitting improvident overdrafts, as alleged in paragraph XIII, on pp. 25-26 of transcript.

But as counsel for appellant assured us in writing that the above charge (b) would not be raised on this appeal, we assume this charge has been abandoned, and as no claim thereon is made in the brief of appellant, and as there is no assignment of error covering such point we shall not comment further thereon in this brief. Also, as counsel do not refer to the above allegation (c) in their brief, and make no assignment of error concerning same, we assume they have abandoned such contention and hence further comment thereon is unnecessary.

This leaves but two charges—(a) that of excess loans in violation of sec. 5200, Rev. Stats. of United States; and (d) that improvident overdrafts were permitted.

Trial was had before the Court without a jury. When appellant rested, appellee Bowerman moved the Court to dismiss the action as to him (Tr. pp. 319-320), and such motion was sustained and the action was dismissed as to appellee Bowerman (Tr. pp. 132-133), from which decree this appeal was taken.

In the complaint (Tr. p. 11, par. V) it is alleged that appellee Bowerman "knowingly permitted and assented to the making of loans by the officers * * * far in excess of the limit provided by sec. 5200 of the Revised Statutes of the United States." The undisputed testimony, as well as the allegations of the complaint, show that the appellee Bowerman had no actual knowledge of any of the acts of the board. This reduces the question to one of presumption or constructive knowledge merely.

The undisputed testimony in the record shows the following facts:

(1) That the cashier was under bond for the faithful performance of his duties (Tr. p. 136).

(2) That the president of the bank was under bond for the faithful performance of his duties (Tr. pp. 136-137).

(3) That under the by-laws no officer of the bank could pay out any money or any check unless the drawer of the check had on deposit sufficient funds to meet such check (Tr. p. 138, sec 19).

(4) That the vice-president of such bank received $100 per month to act as chairman of the committee on Loans and Discounts (Tr. pp. 164-165).

(5) That the board of directors of the bank shall at each monthly meeting or oftener examine and approve all loans and discounts and such approval shall be recorded in a book kept for that purpose (Tr. p. 165).

(6) That appellee Bowerman lived at St. Anthony, Idaho, and it required three days for him to go from his home to Salmon, where the bank was situated (Tr. p. 292).

(7) That appellee Bowerman never had any notice of meetings of the board (Tr. pp. 291-292).

(8) That had appellee Bowerman attended the meetings of the board, he would have had no knowledge of the alleged excess loans, because they were not direct loans but for accumulated overdrafts not appearing on the record submitted to the board (Tr. pp. 286, 287, 288).

POINTS AND AUTHORITIES.

The liability of the directors of a national bank under the provisions of secs. 5200 and 5239 of the Federal sta-

tutes is several.

Chesbrough v. Woodworth, 195 Fed. 875, 880; 116 C. C. A. 465.

The liability of appellee Bowerman is measured by the promise not to knowingly violate or willfully permit to be violated any of the provisions of such statute.

Thomas v. Taylor, 224 U. S. 71; 56 L. Ed. 673-677.

The rule of civil liability of a director of a national bank is fixed by sec. 5239 of the Federal statute.

Yates v. Jones National Bank, 206 U. S. 158; 51 L. Ed. 1002.

Mason v. Moore, 73 O. St. 290; 4 L. R. A. (N. S.) 597.

Emerson v. Gaither, 64 Atl. Rep. 26.

The burden of proof is upon appellant to bring appellee within the terms of the Federal statute.

Warner v. Pennoyer, 33 C. C. A. 222; 91 Fed. 587.

Wells v. Graves, 41 Fed. 459.

To recover against appellee Bowerman, it must be shown that he was guilty of some fraud or knew of or connived at some fraud in others, or that such fraud might have been prevented by him had he given ordinary attention to his duties as a director.

Briggs v. Spaulding, 141 U. S. 132; 35 L. Ed. 662.

Wither vs. Soules, 31 Fed. 1.

It does not follow because appellee Bowerman failed to attend metings of the board of directors that he is thereby responsible for the losses sustained.

Warner v. Pennoyer, 33 C. C. A. 222; 91 Fed. 587.

The appellee Bowerman is not presumed liable because he failed to examine the books of the bank and knowledge should not be imputed to him which the record shows he did not possess in fact.

Briggs v. Spaulding, *supra.*

Clews v. Borden, 36 Fed. 617.

Warner v. Pennoyer, 82 Fed. 181.

Under the Federal statutes, appellee Bowerman is liable only for what he knowingly did or neglected to do.

Jones Natl. Bank v. Yates, 139 N. W. 844.

There should be facts charged and proved showing the alleged losses resulting from the gross neglect of the appellee Bowerman to attend meetings of the Board.

Williams v. Brady, 221 Fed. 118.

ARGUMENT.

Basis of Right to Recover.

The right to recover on the charges of the character here alleged is based upon the provisions of sec. 5239 and other relating sections of the Federal statutes. The above section, so far as it relates to the questions here presented, reads as follows:

> "If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited * * * and in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

The question of forfeiture mentioned in the first portion of the section just quoted does not arise in the case at bar, but the question of participating in or assenting to the alleged violation of sec. 5200 by appellee Bowerman does arise on this appeal. It seems evident that the words "such violation," as twice used in the second portion of the above section just quoted, refer to the acts of the board in the first portion of the section in knowingly violating or knowingly permitting any officer to violate the statute. The thing evidently prohibited by this section is knowingly violating or knowingly permitting a violation of such statute; and these words "knowingly violate or knowingly permit any of the officers or servants of the association to violate any of the provisions of this title" seem to refer to acts by the board, and the words "every director who participated in or assented to the same" makes each of such directors liable. These words also imply some positive action by the board as well as each participant, that is, some action of commission rather than of omission which implies active knowledge or participation unless such acts of omission were so grossly negligent as to amount in law to an act of commission. This language evidently renders such directors severally liable for such violation, as shown not only by the language of such section itself but also from the statement of the court in Chesbrough v. Woodworth, 116 C. C. A. 465; 195 Fed. 875, where the Court, in considering this very section and on page 880, states:

> "The liability of the directors upon such a subject matter is several. The plaintiff may arbitrarily elect one as sole defendant or two or more to be joined as defendants. Against each individual selected, a

sufficient case must be made out to show that he participated in the tort for which a verdict is had.

Measure of Liability.

Counsel for appellant in their assignments of error seek to establish a common law liability against appellee Bowerman rather than such statutory liability as shown in their assignments of error, and in their brief, at page 12, they state: "The question for determination is whether or not each of the appellees is liable at common law for the entire loss sustained by the bank." Then they attack the case of Briggs v. Spaulding, 141 U. S. 132, and they cite the case of Gibbons v. Anderson, 80 Fed. 345, as sustaining their contention.

The case of Gibbons v. Anderson was a case where the trouble arose by reason of the general negligence whereby fraud was committed, but in the case at bar the pleading is based on a violation of sec. 5200 of the Federal statute, where, in paragraph V, on page 11 of the transcript, it is alleged "that the defendants (naming them) * * * knowingly permitted and assented to the making of loans by the officers, agents and servants of the First National Bank of Salmon far in excess of the limit provided by sec. 5200 of the Revised Statutes, of the United States," and in paragraph VI, on pages 12 and 13 of the transcript, it is alleged, "that the said loans * * * were each and all in violation of section 5200 of the U. S. Revised Statutes;" and in sub-paragraph (a) of paragraph X, on page 20 of the transcript, it is alleged "that the said loan is the same loan mentioned in paragraph V hereof, as being in excess of the amount allowed to be loaned under the provisions of sec. 5200, and in sub-paragraph (c) of para-

graph X, on page 22 of the transcript, it is alleged "Said loans are the same loans mentioned in paragraph V hereof and therein alleged to be in violation of sec. 5200."

These allegations show that appellant made special effort to frame such allegations directly within the rule declared in the statute, hence the question is, Does the common law rule of negligence or the terms of sec. 5239 constitute the measure of liability of appellee Bowerman? We contend that his liability is measured by the terms of the statute. We feel we are sustained in this contention by the ruling in the case of Yates v. Jones National Bank, 206 U. S. 158; 51 L. Ed. 1002, and on pages 1013 and 1014 the Court says:

> "Considering the text of the national bank act, as now embodied in the Revised Statutes, including sec. 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. * * * As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them. That the words 'shall knowingly violate, or knowingly permit,' etc., found in the first sentences of sec. 5239, Rev. Stat., were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he

swears 'that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title.' Mark the contrast between the general common-law duty to 'diligently and honestly administer the affairs of the association' and the distinct emphasis embodied in the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.' In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute imposed certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.'

"And general considerations as to the spirit and intent of the national bank act * * * also render necessary the conclusion that the measure of responsibility concerning the violation by directors of express commands of the national bank act is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act."

And on page 1015 the Court further states:

"Where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional."

And such Court refers to Mason v. Moore, 73 O. St. 275; 4 L. R. A. (N. S.) 597, where the Court, on page 605, states:

"We have in this section the statutory standard of liability and it relates to every director who participated in or assented to the violation of the provisions of the statute of which said action forms a part. If he did not participate in or assent to such violation,

> this statute fixes no individual or personal liability against him."

This ruling is approved in Thomas v. Taylor, 224 U. S. 71; 56 L. Ed. 673, 677.

Burden of Proof.

The appellee Bowerman having been selected as one of the directors who is alleged to have participated in or assented to the violation of such sec. 5200 in making excess loans, we contend that the burden is on the appellant to affirmatively show that the appellee in some way participated in or assented to the violation alleged. This rule is announced in Chesbrough v. Woodworth, 116 C. C. A. 465; 195 Fed. 875, and on page 880 the Court says:

> "Against each individual selected, sufficient case must be made out to show that he participated in the tort for which a verdict is had."

This rule if sound casts the burden on appellant to show affirmatively that appellee Bowerman participated or assented to the torts charged. It is not enough to let such a charge rest on assumption or conjecture. The statutory requirement should be complied with. We feel we are amply sustained in this contention by the ruling of the Court in Warner v. Pennoyer, 33 C. C. A. 222; 91 Fed. 587, and on pages 593 and 594 the Court states:

> "As to all these losses, the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. If it were, the cases would be few in which the directors of a bank, wrecked by

> the misconduct of a cashier, could not be held accountable for all the losses. The court cannot decree upon conjecture."

There is not one word in the record showing that appellee Bowerman had any actual knowledge of any of the violations of sec. 5200 alleged, at the time they or any of them occurred, or that he ever ratified them, and hence he could not have participated in them or assented thereto. The only testimony that can even be claimed tends to show knowledge of the condition of the bank is contained in Exhibits 34 and 35, at pages 293 and 299 of the transcript, but nothing in these exhibits even hints at any knowledge of the violations charged.

The burden of proof is clearly on the appellant to bring the appellee Bowerman within the terms of sec. 5239. This is true not only on the general rules governing pleadings and evidence but the torts alleged must be brought home to Mr. Bowerman as to each alleged excessive loan. This we contend has not been done because the allegation in par. VII of the complaint, on pages 15 and 16 of the transcript, declares that he "willfully" failed to attend the meetings of the board, and that he "willfully" failed to discharge his duties in keeping himself informed concerning loans, and "willfully" failed to exercise proper or any authority as such director over said bank's affairs, and that he "willfully" permitted and allowed the said King and Lottridge to make such loans, and there are many similar allegations in other portions of the complaint. These allegations imply not only of the thing so *willfully* done, but a determination with a bad intent to do it or omit to do it. While making such charges of *willfully* doing things or not doing things, no proof is offered of

any bad faith on the part of Mr. Bowerman, and this we contend is not sufficient.

In this connection we call attention to the statement of the Court in the case of Potter v. United States, 155 U. S. 438; 39 L. Ed. 214, and on page 217 the Court states:

> "Doing or omitting to do a thing knowingly and willingly implies not only a knowledge of the thing but a determination with a bad intent to do or omit doing."

Hence proof of such knowledge implied in such allegation should have been made. If it were proper to make such allegations, it is necessary to prove them, and the proof being wholly lacking the liability of appellee Bowerman has not been established. Appellant has not shown that Mr. Bowerman participated in or assented to one alleged excessive loan or that any damage resulted from any action or omission or commission by him, thereby ignoring the rule laid down in Wells v. Graves, 41 Fed. 459, and on page 461, where the Court, in commenting on this very section 5200, alleged to have been violated by Mr. Bowerman, states: "It must be ascertained which of the defendants assented to each excessive loan." The theory of appellant seems to be that because there was carelessness of the officers of the bank and of the loan committee in allowing overdrafts until they totalled an amount in excess of the 10 per cent of the capital of the bank, and a note was given therefor, therefore, the appellee Bowerman was liable without attempting to prove that he knowingly or in bad faith or fraudulently permitted such loans to be made. This is seeking a recovery on general allegations without proof of any act or knowledge of the alleged acts of commission. This theory cannot

meet the approval of courts, as indicated on pages 593 and 594 of Warner v. Pennoyer, 91 Fed. 587; 33 C. C. A. 222, where the Court states:

> "As against two of the directors, the case for the complainant is predicated upon their failure to attend the semi-annual meetings of the board. It is not a necessary or legitimate inference that this omission was a contributory cause of the losses. It does not follow, because a director has failed to attend meetings, that he is legally or morally responsible for the disasters that may have befallen his bank. In the present case, the board had provided for a reasonably vigilant supervision of the cashier. The cause of the losses was the neglect of those who had been appointed to keep watch of the discounts. Those directors who attended the meetings, and had no reason to suppose that the members of the discount and examining committees were neglecting their duties, are not responsible for the losses, which are solely attributable to such neglect. The directors who did not attend the meetings are in no worse category. What could they have done or prevented, exercising common diligence, if they had been present? A director who has failed to act is not liable for the thefts or shortcomings of the cashier, unless it appears, inferentially, at least, that his omission had some proximate relation to the losses."

See also,

Hanna v. People's Nat. Bank, 71 N. Y. Supp. 1076.

And in Williams v. Brady, 221 Fed. 118, and on page 122, the Court states:

> "There being no legal presumption of negligence and liability for loss against the defendants who did not attend the meetings of the board, one who undertakes to make them responsible should state facts sufficient to put them upon their defense."

Failure to Attend Meetings.

The mere fact that appellee Bowerman failed to attend the meetings of the board is not sufficient proof of his liability. This fact may very properly be a circumstance to be considered, but it is not proof that he participated in or assented to these violations charged. Some light may be thrown on this condition in Warner v. Pennoyer, 91 Fed. 594. The record here shows that the cashier was under bond and the chairman of the committee on Loans and Discounts, N. I. Andrews, was paid $100 per month for his services on that committee (pp. 136, 138, 164, 165, Tr.). Under these conditions there is no legal inference of liability against Mr. Bowerman merely because of his absence from meetings. The record further shows that, had he been present at such meetings, he would not have known of the alleged excess loans because these loans were accumulations of overdrafts (Tr. pp. 286 and 287) and were not direct loans. There is no attempt to show that Mr. Bowerman had any actual knowledge of any of these alleged excessive loans. Must not appellant bring home some participation in or assent to each of these loans to render Mr. Bowerman liable?

In Wells v. Graves, 41 Fed. 459, and on page 461, the Court states:

> "Under the counts charging violations of sec. 5200 of the Revised Statutes in loaning to one person, firm or corporation amounts exceeding one-tenth of the capital stock, the condition of the accounts, and the nature of the indebtedness of the different parties named, must be investigated. Not only so, but it must be ascertained which of the defendants assented to each excessive loan, and the damage caused thereby to creditors must be properly traced out."

There was no attempt to follow this rule in any particular as to Mr. Bowerman. They simply show he was absent from the meetings.

As stated by the trial court in his opinion herein (Tr. pp. 131-132): "A special committee on loans and discounts as well as an examining committee was maintained, and an additional safeguard, it was reasonable to assume, lay in the fact that the vice-president for whom he (Bowerman) seems to have a high respect, was being paid a compensation sufficient to obligate him to give a substantial part of his time to a supervision of the affairs of the bank." Had these committees and this paid official done their duty, there could have been no such violation of the statute as alleged was committed. This shows who participatel in and assented to these excess loans, if any were made.

This view is emphasized by a statement in Warner v. Pennoyer, *supra,* 33 C. C. A. 222; 91 Fed. 593, as follows:

> "We are of the opinion that only those directors including the president shall be held responsible for these losses who were members of the discount and examining committees. If these persons had performed their duties faithfully, while it cannot be said that there would have been nothing to cirticise in the management of the bank, it may be reasonably inferred that the losses from the deals for the benefit of the Western Improvement Company would not have occurred. If the other directors were cognizant of the neglect of duty of these directors, the proof does not show it."

There can be no contention here that the proofs show that appellee Bowerman had any actual knowledge of, participated in, or assented to, a single excess loan unless a failure to attend the meetings of the board was such

gross negligence as to amount to knowledge constructively. We contend that the language of sec. 5239 implies that if the tort charged is an active one, is some positive action of the board, the appellant must show that appellee Bowerman actively, in the sense of knowingly, participated in or assented thereto. But the testimony wholly fails to show any such participation or assent on the part of Mr. Bowerman.

It is declared in Mason v. Moore, 4 L. R. A. (N. S.) 597, and on page 605, as follows:

> "Participating and assenting both imply affirmative action of some sort as distinguished from mere silence and inaction."
>
> Emerson v. Gaither, 18 Atl. 26.

If the basis of the suit were non-action (which is not the case here), the appellant must show affirmatively that appellee Bowerman participated in or assented to such non-action, that is, we contend that a proper construction of such sec. 5239 is that where a board knowingly violates this banking act, this is a charge of an active violation, or if the board knowingly permits a representative of the bank to violate such banking act, this is a non-active violation of the act; therefore, if the board is charged with non-action, the proof of an inactive participation in or assent thereto would be consistent with the terms of the section, but in the case at bar appellant alleges a positive act of the board in violating the law, then attempts to hold Mr. Bowerman liable by proofs that he did not actively participate in such violation. We contend this is not sufficient. We are sustained in this contention, we feel, by the ruling of the court in Chesbrough v. Woodworth, 116

C. C. A. 465; 195 Fed. 875, where the Court on pages 880 and 881 states:

> "When the thing criticized is the positive action of the board, plaintiff should affirmatively show that the selected defendant in some way participated or assented to this action; and when the foundation of the suit is the non-action of the board, and such wrongful non-action appears, that defendant's individual responsibility rests upon the same considerations—i. e., it must appear that he participated in or assented to the wrongful inactivity, by failing to make reasonable personal efforts to induce the proper action."

In the case at bar, the board is charged with a positive, knowing violation of the statute and the appellee is charged with the same positive and knowing violation of such statute. Now they offer proof that he actually knew nothing about it. This we contend is not sufficient. Some light may be thrown on this contention by a statement of the Court in Movius v. Lee, 30 Fed. 298, and on page 305, where the Court states:

> "The complaint against them (the directors) is not that they acted negligently or carelessly in actually doing anything, but that they neglected to do anything. What they did not do, the omission to do which caused damage, was the restraint of Lee in what he did. So the real question is whether they are chargeable for the consequences of what he did, because they did not prevent it."

This illustrates the case at bar. The board of directors is charged with knowingly and willfully violating the statute. Then the appellee Bowerman, one of the directors, is sought to be held because he did not prevent such violation, and the testimony of appellant shows that the reason, if any, why he did not prevent such violation by

others was because he knew nothing about it; not because he participated in or assented to such violation, but because he did not.

The contention of this prosecution seems to be that each director has to be responsible for the others under this statute. This is emphasized by the statement of the Court in the last above mentioned case (Movius v. Lee) on page 305.

> "The body of directors of a national bank is charged with the supervision and management of its officers, and is bound to use as much diligence and care as the proper performance of these duties requires. * * * But this obligation does not appear to require every director to attend himself to every part of the corporate business, nor make each liable for every act done by any of them. They do not undertake each for the others."

And on pages 306 and 307 of the same case, the following appears:

> "He became director and is liable for all that he did as director, but he was not bound to attend every meeting of the directors. It is not part of the duty as a director to take part in every transaction which is conducted at a board meeting. His business or his pleasure may call him elsewhere, and it would be a most unheard of thing to say that if anything wrong was done at a board meeting, he being named among the directors, but not present, he is liable for what is done in his absence."

And on page 307 the Court further states:

> "There is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. * * *
>
> "The measure of the duty of directors is frequently

> and emphatically laid down, and is clear and plain; but it is nowhere adjudged that all must always act, or that they must not trust one another to act, or that any are liable for the mere omission to watch and restrain the others, without wrong intention on their own part, or actual knowledge of the wrong on the part of the others."

There is not one word in the testimony in even Exhibits 34 and 35, found on pages 298 and 299 of the transcript, that appellee Bowerman ever had any actual knowledge of such alleged excess loans, or any of them, because the published statements admitted in evidence (Exhibits 29 to 23), as shown on page 293 of the transcript, were admited in evidence "upon the condition that it be shown that defendant Bowerman had knowledge of such published statements." The condition was not attempted to be complied with, except by introducing Exhibits 34 to 35, found at pages 293-297 of the transcript, and on page 294 of the published statements, that Mr. Bowerman saw "was published under date of June 30, 1910," and not one of such published statements (Exhibits 29 to 33) refers to excess loans. And the trial court very properly refers to Exhibit 34 on page 129 of the Transcript as follows: "The letter itself (Ex. 34) furnishes no proof of a knowledge of excess loans."

Fraud or Bad Faith.

There is no charge of fraud or bad faith and not one word of testimony tending to show any fraudulent transactions or any connivance or conspiracy.

In Briggs v. Spaulding, 141 U. S. 132; 35 L. Ed. 622, which is probably the leading case on the questions at bar, it would seem that some such showing is necessary, for on the foot of page 669, the Court states:

> "Upon a close examination of all the reported cases, although there are many dicta not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties."

And on foot page 670 the Court further states:

> "Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequences of omission on their part."

In Mason v. Moore, *supra,* (4 L. R. A. N. S.), on page 606, the Court states the question clearly in these words:

> "A director of a bank whose services are gratuitous, * * * does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such gross negligence as amounts to fraud."

To hold appellee Bowerman liable simply on presumption or constructive notice of the tort charged would, it seems, be carrying the rule of constructive notice to an unreasonable extent, in the light of the positive language of sec. 5239, for this would be imputing knowledge to him which the testimony fails to show he had. This is indicated in Briggs v. Spaulding, *supra*, and on foot page 674, where the Court states:

> "I know of no case, except ex parte Brown, which shows that it is the duty of a director to look at the entries in any of the books, and it would be extending

> the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge of which is sought to impute him in this case."
>
> Movius v. Lee, 30 Fed. 298.
>
> Warner v. Pennoyer, 91 Fed. 587.

We had prepared in our preliminary brief to meet the question charged of accepting illegal dividends on the part of Mr. Bowerman, but as counsel seem to make no contention on this, we omit it from this brief.

There is not one word of testimony tending to show that any of the alleged losses resulted from the failure of Mr. Bowerman to attend the meetings of the board or from any other acts of omission or commission.

The rule is well stated in Williams v. Brady, 221 Fed. 118, and on page 122 the Court says:

> "I conclude that, for the acts charged to have been done in pursuance of meetings where the directors attended, the defendants who did attend are sufficiently charged. But allegations that certain directors are liable because of 'unreasonable neglect and failure to attend' are not enough. What constitutes an unreasonable neglect and failure to attend meetings of directors? Not necessarily the opinion of the plaintiff. Surely there ought to be facts set forth from which the court can say that the conclusion of the pleader that there was unreasonable failure is well founded. There being no legal presumption of negligence and liability for loss against the defendants who did not attend the meetings of the board, one who undertakes to make them responsible should state facts sufficient to put them upon their defense."

If this rule of pleading is sound, then it necessarily follows that proof of such acts when alleged should be made.

Counsel by their second assignment of error, beginning at page 367 of the transcript, and on page 9 of their brief,

seek to hold the appellee Bowerman for the balance of about $3800 not now collectible by the receiver, on the ground of a common law liability for failure to attend meetings of the board. The overdrafts then unpaid, portions of which the receiver alleges he is unable to collect, are itemized on pages 28 to 38, inclusive, of the transcript. The Court will notice that these alleged overdrafts were all made in the years 1910 and 1911, and there is no testimony showing that these parties were not fully responsible for these overdrafts when made. The trial court comments on this failure in the testimony, beginning on page 116 of the transcript, where the Court states:

> "The receiver finds that overdraft accounts approximating $3800 are uncollectible. There is no substantial proof on the proposition that numerous individuals to whom these overdrafts were allowed were at the time unworthy of credit; in other words so far as appears, if instead of accepting and paying the checks as they came in the defendant had taken ~~notice~~ note from the borrowers for equivalent amounts, there would have been no ground for complaint. The national banking law does not prohibit overdrafts."

This shows that even under the common law rule so earnestly invoked by appellant, there is no proof showing negligence in permitting such overdrafts when made, but appellant seeks to show that these overdrafts were improvident by showing that in 1915 the balances thereon could not be collected, as appears from the return on execution against Harry G. King, on page 190 of the transcript, and the return on execution against Ray Edwards, on pages 202-203 of the transcript, and the return on execution against Harry Brown on pages 215, 216 of the transcript, each of which returns was made in 1915.

While appellant alleges the excess loans as a specific violation of sec. 5200 of the Federal statute (par. V, p. 11 of transcript), he further contends that the overdrafts made from time to time comprising such excess loans were negligently made, but without any proof that those to whom such overdrafts were granted were not fully worthy of such credit by overdrafts at the time made. To illustrate: Take the alleged excess loan to one Harry Brown. While it is alleged (p. 22 of Tr.) that this loan was made January 2, 1911, being Exhibit 28, found at pages 287 and 288 of Transcript, still appellant's evidence (p. 286 of Tr.) shows that the overdrafts making up this loan, were commenced in 1908 and continued by overdrafts and various notes until all such notes and overdrafts were merged in the alleged note of $6500 and the alleged note of $6200, or $12,750, as alleged on page 22 of the transcript; but the evidence shows that return on execution to enforce such amounts, was not made until February 25, 1915 (pp. 215-216 Tr.). This shows the importance of proof that this party was not worthy of credit when the numerous overdrafts were permitted, and, as suggested by the trial court, as above quoted. This applies with equal force to the other notes that were so made by overdrafts and alleged to have been loaned on a certain date.

While, as stated in Mason v. Moore, *supra,* and intimated in Yates v. Jones Nat. Bank, *supra,* that the Federal statute "does not preclude a liability at common law," still, when the right of recovery is based directly on a violation of a specific inhibition by the statute, then the statute, it would seem, would be the measure of liability for such violation. It is not a violation of the common law for a national bank to loan to one person in excess of

10 per cent of the capital of such bank, but it is prohibited by sec. 5200 of the Federal statute, hence we contend that the Federal statute is the measure of liability and not the common law, where the provision of the statute is violated. If this were not true, then of what purpose is the statute?

This question is referred to in Yates v. Jones Nat. Bank, 206 U. S. 158; 51 L. Ed. 1012, and on foot page 1014, in the following language:

> "The frustration of the public policy embodied in the national bank system by the crippling of the usefulness of such institutions, which would result from holding that directors, in performing the duties imposed upon them by the national bank act, might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate.
>
> "The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability. Farmers' and M. Nat. Bank v. Dearing, 91 U. S. 29; 23 L. Ed. 196, 199, and cases cited. The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability."

The statement of the trial court, "Considering the nature of the wrongdoing charged, it is thought that these statutory provisions rather than the general rules of the common law furnish the measure of defendant's duty and responsibility," on page 112 of the Transcript, strikes the question squarely.

Jones Nat. Bank v. Yates, 139 N. W. 844, 1135.

There is a failure of proof even under the common law rule so invoked in two respects:

(a) There is no proof that such overdrafts were improvident;

(b) There is no proof that appellee Bowerman had reason to know that improvident loans were being made.

The trial court, on page 121 of Transcript, in referring to this feature states: "Upon the whole, I am inclined to the view that in extending credit up to the statutory limit, he acted with ordinary prudence." In this statement the Court was referring to the defendant Harry G. King, who was the cashier of the bank. If this is true as to Mr. King, then it must be doubly true as to the appellee Bowerman.

By a perusal of Gibbons v. Anderson, 80 Fed. 345, and Rankin v. Cooper, 149 Fed. 1010, cited by appellant, it will be observed that appellant does not bring himself within the rule announced in the cases so cited because in those cases, under the testimony there given, the Court fixed a time when, by reason of certain testimony, the directors should have taken notice of the condition of the bank; hence we contend that the trial court was right when he held that the liability of appellee Bowerman must

be measured by the terms of the statute, and hence the proof must show that he knowingly permitted the excess loans to be made and the proof should show that such overdrafts were improvidently made at the time they were made.

Respectfully submitted,

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